IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

## No. 550

GEORGE F. WOOD, GRACE SCHMIDT, H. GLEN WOOD, LEAFFIA HOWE,

*Petitioners,*

*vs.*

FIRST NATIONAL BANK OF WOODLAWN, ILLINOIS, A NATIONAL BANKING ASSOCIATION, KINGWOOD OIL COMPANY, A CORPORATION, ALFRED J. WILLIAMS, MILDRED F. WILLIAMS, WALTER DUNCAN, E. A. OBERING, HELEN BAILEY OBERING, JAMES F. BREUIL, R. J. FRYER AND R. F. RATCLIFFE, CO-PARTNERS DOING BUSINESS UNDER THE NAME AND STYLE OF FRYER AND RATCLIFFE: R. J. FRYER, OLIVE LOUISE FRYER, R. F. RATCLIFFE, GRACE RATCLIFFE, ROY POWERS AND NIOTAZE POWERS,

*Respondents.*

## REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS.

The brief of respondents charges that the petition for certiorari contains inaccuracies, omits material facts. Respondents have set forth a number of controverted facts not material to any issue and presented and argued issues which have never before been raised. The effect is to divert attention from the genuine issues and the simple ultimate facts by which they are presented. For that reason petitioners submit this brief reply and adopt the titles and sub-titles employed by respondents.

## I.

## JURISDICTION.

Under this heading respondents charge that petitioners failed in their jurisdictional statement to indicate that any question was raised concerning the order of January 10, 1938 approving the Master's report of conveyance filed on December 9, 1937 and allege that that order constituted an implied approval and confirmation of the Master's report of sale which had been on file since October 1, 1936, citing the opinion of the Supreme Court of Illinois in this case as authority therefor. It was not this so-called order, but the failure and refusal of the Supreme Court of Illinois to adjudge this so-called order void because it was no order and because it was entered without notice which gives rise to the federal question submitted to this Court herein.

Respondents further charge that the petitioners did not even mention this so-called order in their complaint in the trial court; but they admit that the existence of such an order was put in issue in the trial court by the answer of respondents and the reply of petitioners in which petitioners denied that any order of court was entered approving said report of conveyance or that if the same was approved, that it was never approved by an order of court, and denied that the purported order constituted an approval of the Master's report of sale (Rec. 102, 117, 118). And the opinion of the Supreme Court of Illinois establishes for certainty that the question was not only raised in that Court, but decision was made thereon, by reason whereof no further specification was necessary.

## II.

## STATEMENT OF THE CASE.

Under this heading respondents charge that petitioners' statement of the case contains inaccuracies and omissions and follow the charge with five pages of statements of facts and issues which are unimportant and have no tendency to clarify the central issues submitted for adjudication. An issue is created over the service by publication upon the petitioner, George F. Wood and wife, although there is no issue in that regard. Further, it is alleged, on page 4, that petitioners' claim that no notice was given to H. Glen Wood or his attorney with respect to any proceedings or orders in the foreclosure case subsequent to the public sale of September 5, 1936 and his right to such notice are all mere conclusions without support in the record. The veiled inference is that there was proof in the record that some notice was given. At no time have respondents offered to prove or pointed to anything in or out of the record of the foreclosure suit which might tend to establish that formal or actual notice of any proceedings subsequent to the public auction held on September 5, 1936 was given or received. In no brief or pleading filed by any of respondents has there been so much as a suggestion of an assertion that such a notice was given or received. At the trial counsel not only made no effort to prove formal or actual notice but sought in every way to prevent proof that no actual notice was in fact given (Rec. 192). It is axiomatic that where formal notice is required in a legal proceeding the burden of proof with respect to the giving of such notice is upon the party required to give the notice.

Among the material facts alleged by respondents to have been omitted by petitioners is the statement, on page 6 of the brief of respondents, that after December 9, 1937

the defendants in the foreclosure suit (including all the petitioners herein) voluntarily surrendered possession of the premises to the Bank some time during the latter part of February, 1938. This statement is predicated upon an assertion by respondents' witness, Morton Wood, which was a pure conclusion and was immediately refined by him so as to destroy entirely the value of the assertion. The testimony of the witness on this point, in full, was as follows:

> "The defendants yielded up possession of it voluntarily. At the time the foreclosure suit was filed W. C. Wood lived on the mortgaged premises. He was the father of the plaintiffs in this action. He continued to live there during the redemption period. He and his son held a public sale some time in February, 1938, and moved off." (Rec. 157.)

Respondents seek to infer that Petitioner, H. Glen Wood, must have in some way acquired some knowledge with respect to the false Master's report of sale by stating, as a material fact, on page 7, that H. Glen Wood moved to Mount Vernon, Illinois, in the same county (Jefferson) in March, 1938, and that county continued to be his home and voting place up to the time of trial of this suit below, but omit to add that in June, 1938, H. Glen Wood moved to Manteno, in Kankakee County, Illinois, where he was still living at the time of the trial and has never moved back to Mount Vernon, although he has been back (Rec. 133).

It is universally held that notice to one tenant in common is not notice to co-tenants (Freeman on Co-Tenancy, Para. 171; *Wait* v. *Smith*, 92 Ill. 385, 393; *Babcock* v. *Wells*, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848; *Strickland* v. *Capital City Mills*, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426). It is also universally held that it is not possible for one tenant in common to bind his co-tenants by any act or admission (*Omaha & G. Smelting & Ref. Co.* v.

*Tabor*, 13 Colo. 41, 21 P. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; *Anderson* v. *Acheson*, 132 Iowa 744, 110 N. W. 335, 9 L. R. A. (N. S.) 217; *Williams* v. *Bruton*, 121 S. C. 30, 113 S. E. 319).

Respondents further allege, on page 7 of their brief, that the respondent Bank after going into possession of the property made some improvements thereon. The improvements consist of re-roofing the house and barn (Rec. 158). Respondents further allege, on page 9, that certain expenditures by way of drilling, equipping and operating costs on five wells were made up to February 28, 1942, presumably to create the inference that substantial expenditures had been made prior to the institution of this suit. This would be an unfair and untrue inference. It is to be noted that respondents refrain from making any statement that any expenditures were made on this account prior to the institution of this suit.

## III.

## ARGUMENT.

### Federal Question.

Respondents argue, on pages 13 *et seq.*, that the allegations in petitioners' complaint in the trial court were insufficient to present a federal question for decision or to meet the statutory requirements because petitioners made no reference to the Constitution of the United States nor did they adopt the phraseology of the due process clause of either the 5th or the 14th amendments or use any language bearing the remotest similarity to such phraseology, and that by reason thereof the allegations are inadequate to show by clear and necessary intendment that a federal right was being asserted or to make known to the Court that it was being called upon to adjudicate any federal right, title, privilege or immunity and extensively quote from the opinion in two cases where the issues were such that no federal question was involved unless the federal question was specifically invoked by the litigants. It is, however, to be noted that the opinion in the F. G. Oxley Stave Co. case recognized the true rule as contended for by petitioners and well established by the decisions of this Court in *Bridge Proprietor* v. *Hoboken Land and Improvement Co.*, 1 Wall. 116, 143, 17 L. Ed. 571, 575, and *St. Louis Iron Mountain and Southern Railway Company* v. *Starbird*, 243 U. S. 592, 598, 61 L. Ed. 917, 922. Each of these decisions follows the opinion of Mr. Justice Storey in the case of *Crowell* v. *Randall*, 19 Pet. 368, and summarizes the circumstances under which this Court will review the decisions of State Courts as follows:

* * * * *

> "Third. That it is not necessary that the question should appear on the record to have been raised and

> the decision made in direct and positive terms *ipsissimis verbis,* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment * * *."

Respondents next, on page 17, repeat the contention that no question has been raised by petitioners with respect to the so-called order of January 10, 1938 approving the Master's report of conveyance filed on December 9, 1937 or lack of notice in connection therewith, and that since this order amounted to a confirmation of the Master's report of sale on file since October 1, 1936, no federal right has been set up or claimed with respect thereto. This argument ignores the fact that issue thereon was created by the pleadings in the trial court (Rec. 102, 117, 118) and decision made thereon by the Illinois Supreme Court and that respondents have never claimed that any notice of the application for this so-called order was ever given and took the position during the trial that notice was unnecessary and immaterial (Rec. 192).

Because great reliance is placed on this so-called order of court may we suggest the following pertinent considerations which will bring the character and effect of this subject into sharper focus: First, the decision of the Supreme Court of Illinois in this case is the first case in that or in any other jurisdiction which holds that the property of a mortgagor may be taken from him by an order of court induced by fraud entered without notice to him and without affording to him an opportunity to be heard. Second, there is no decided case in Illinois or in any other jurisdiction other than the opinion of the Supreme Court of Illinois in this case to the effect that the approval of a report of conveyance amounts to a confirmation and approval of a sale where prior thereto such confirmation and approval has been withheld or, in fact, has been expressly

refused as was done in this case (see minutes of the Circuit Court of Jefferson County entered and stricken on July 22, 1937, Abst. 323). Third, the so-called order of January 10, 1938 is not, in fact, an order of court but a mere memorandum on the docket, transcribed by the clerk, and does not bear the signature of the judge as is the universal practice in equity cases in Illinois. Fourth, if this so-called order of January 10, 1938 actually had the effect of approving and confirming the Master's report of sale filed October 1, 1936, why was it necessary for counsel for respondents to apply for and for the court to enter the purported order of June 10, 1941 approving the Master's report of sale and immediately thereafter to obtain a fresh, new Master's deed to the property? Fifth, the foreclosure decree contemplated the filing of a report of sale (Rec. 219) and the confirmation thereof (Rec. 221) and this decree was the law of this case upon which petitioners had the unquestioned right to rely.

Respondents have also set forth quotations from the brief of petitioners in the Illinois Supreme Court which is not in the record in this case, said quotations consisting of "Errors Relied Upon for Reversal" and "Propositions of Law" and argue that no federal question was presented to the Illinois Supreme Court. It is to be noted that they refrain from references to the portions of the brief in which lack of notice required by the amendments of the Constitution is argued. It will also be noted that the federal question was necessarily involved in the decision of the Illinois Supreme Court with respect to all of the errors relied upon for reversal and in all of the propositions of law except I.

Cases are cited by respondents in support of their contentions with excerpts therefrom and we have examined each of these cases and they wholly fail to negative the existence in the instant case of a federal question or the

availability thereof for review by this Court. In fact, *Brinckerhoff, Faris Trust & Savings Bank* v. *Hill*, 281 U. S. 673, 682, 74 L. Ed. 1107, 1114, and a separate portion of the opinion in that case were cited by petitioners in their petition for certiorari and is considered by petitioners to be an authority contrary to the interpretation therefor urged by respondents.

We have been unable to find the statements on pages 35 and 37 of the petition for certiorari which are citicized by the respondents on page 24 of their brief, but the statements might as well have been made and the criticism is apparently designed to persuade the Court that if the Master in Chancery presented the orders in question, he would not be required to serve notice upon attorneys of record. The mere statement of the proposition demonstrates the sophistry.

Respondents next complain that the record filed with this Court does not purport to be complete and that the certificate of the Clerk of the Supreme Court of Illinois does not state that it is a complete transcript of the record in the case. This objection does not merit extended notice. Section 7 of Rule 38 permits the use of the printed record below, supplemented by such additions as may be necessary to show the proceedings in the Illinois Supreme Court and the opinions there. The requirements of the rule have been met.

## IV.

## NON-FEDERAL GROUNDS IN THE DECISION OF THE ILLINOIS SUPREME COURT.

Under this heading respondents argue that there is no federal question in the instant case because the decision of the court below was based entirely on non-federal grounds, but respondents are unable to justify the decision of the court below on these non-federal grounds except by citing the opinion of the Illinois Supreme Court in this case. These grounds were discussed in the petition for certiorari and need not be reviewed here. However, respondents cite *Speck* v. *Pullman Palace Car Co.*, 121 Ill. 33; *Davies* v. *Gibbs*, 174 Ill. 272, and *Barnes* v. *Henshaw*, 226 Ill. 605, as authorities for the proposition that the confirmation of sale in the foreclosure suit is conclusive as to all matters upon which the Court might have passed had the parties brought these matters forward as objections to the confirmation. The rule there laid down has reference to objections which were not urged in opposition to a motion for confirmation. In no one of these cases was there any question as to fraud or lack of notice or opportunity for hearing which are the vices which pervade the confirmations in issue herein.

Respondents next assert that there is no showing of fraud or unfairness to prevent plaintiffs from redeeming within the statutory period and that petitioners could have redeemed at any time within twelve months from the sale. This argument assumes the point in issue. It disregards the uncontroverted fact that petitioners had no notice or knowledge that the Master in Chancery, acting in concert with his office associate, counsel for First National Bank of Woodlawn (Rec. 152), had filed a false and fraudulent report of sale. In the absence of such knowledge there was

no reason why H. Glen Wood was required to do other than reply upon his status as a successful bidder and to assume that he would have notice and an opportunity to make good his bid before the sale could be set aside and as long as H. Glen Wood knew that he was the successful bidder at the sale there was no reason why he would have been activated to make any inspection of the court files which would necessarily be a prerequisite to the detection of the false report and the filing of objections thereto. The lack of notice in connection with the approval of the false report had the effect of depriving him of the ability to take any action for his own protection and by the time the false report had been approved the statutory period of redemption had expired. Such was the further fraudulent device by which the rights of petitioners were abridged.

Respondents further mention that no offer of redemption was made by petitioners until five years after the sale. Presumably the inference respondents seek to create is that this delay amounts to laches, but respondents cite no authorities to rebut the authorities submitted by petitioners that in the application of laches an indispensable element is that the party charged must have had knowledge of the facts, and the doctrine will not be applied where the party against whom it is sought to charge laches was, in fact, in ignorance of material facts connected with his right and relating thereto.

## V.

## THE RECORD WITH RESPECT TO LACK OF NOTICE.

Under this heading the argument of respondents amounts to an assertion that since the record in the foreclosure suit is silent on the question of whether or not notice was served in connection with the orders approving

the Master's report of sale and report of conveyance and there is no proof in the record to the contrary, the presumption must be indulged that the notices were served. Put in other words, the contention is that inasmuch as no notice was served and by reason thereof no proof of notice appears in the record, therefore the record demonstrates that notice was, in fact, served. It is respectfully submitted that this contention when reduced to its logical conclusion is an obvious absurdity. The absence of the notice from the record in the case is evidence that no notice was, in fact, served. At no time during the proceedings have the respondents ever contended that a notice was served, and in their argument under this heading respondents deny that a notice was required. Furthermore, during the trial of this case counsel for the respondents objected to the introduction of evidence tending to show that no actual notice was received by petitioners on the ground that the question as to whether there was actual notice was entirely immaterial (Rec. 192). Finally counsel for respondents, it will be noted, do not under this heading assert that notice, in fact, was given.

Respondents next argue that when a judgment of a court of general jurisdiction is attacked collaterally every presumption is indulged in favor of the validity of the proceedings and the court's jurisdiction, unless it affirmatively appears on the face of the record that the court was without jurisdiction. But the presumption in favor of jurisdiction is a rebuttable presumption. *Forrest* v. *Fey*, 218 Ill. 165, 170, cited by respondents; *Swearengen* v. *Gulick*, 67 Ill. 208, 212; *Hemmer* v. *Wolfer*, 124 Ill. 435, 440; *Clark* v. *Thompson*, 47 Ill. 25, 27; *Donlin* v. *Hettinger*, 57 Ill. 348, 353; *Johnson* v. *Johnson*, 30 Ill. 215, 223. This presumption is rebutted in the instant case by a lack of notice in the record or any finding in the alleged order approving

the foreclosure sale or the so-called order approving the Master's report of conveyance to the effect that such notice was given or served or that counsel was present in open court at the hearing thereon.

Having argued that the record in the case fails to show that there was non-compliance with the rule of the Circuit Court of Jefferson County with respect to notice, respondents next argue (page 33) that the offer of petitioners to prove that they had no actual notice with respect to the proceedings in the foreclosure suit subsequent to September 6, 1936, was insufficient because the offer of proof did not specifically include the attorney for H. Glen Wood. However, in the court below the objection to this offer of proof was on the ground of materiality and the objection was sustained (Rec. 192). No objection was there taken to the form of the offer of proof. It is respectfully submitted that the form of the offer is not a material issue in the case since it is a well recognized proposition that the attorney of record in a case is the agent of the client for all procedural purposes in the case and that knowledge on the part of the agent is chargeable to his principal, by reason whereof the offer of proof mentioned and quoted on page 33 of respondents' brief (Rec. 192) necessarily would include knowledge on the part of such attorney. Curious it is that this issue with respect to the form of the offer of proof, once deemed immaterial by respondents, is now deemed so material as to raise an issue for the first time in this Court which has not been raised heretofore. For this reason alone, if for no other, it is submitted that the contention is untenable.

## VI.

## RESPONDENTS WERE NOT AND ARE NOT BONA FIDE PURCHASERS.

The answer of respondents in this section does not attempt to demonstrate how the defense of bona fide purchaser is available to any one claiming through a void deed, decree or order. Since all proceedings subsequent to the public sale of September 5, 1936, at which H. Glen Wood became the purchaser, and the Master's deeds were void, the defense of bona fide purchaser is not available to any of the respondents and must be disregarded. In their argument respondents elaborately review the evidence, but fail to cite a single authority to the contrary of the above proposition.

## VIII.

## LACHES.

The brief of respondents under this heading does not attempt to demonstrate that petitioners had actual knowledge of the wilful misstatement of facts contained in the Master's report of sale which was filed on October 1, 1936, except to argue that petitioners were necessarily put on notice and inquiry which should have led to immediate full knowledge. However, no evidence is cited or authorities submitted to this effect. Since under the authorities cited by petitioners in the petition for writ of certiorari it is an indispensable element in the application of laches that the party who is sought to be charged therewith must have had knowledge of the facts and that the doctrine will not be applied where the party against whom it is sought to charge laches, is *in fact*, in ignorance of material facts con-

nected with his rights, petitioners are not chargeable with laches with respect to the period of nearly five years during which the false Master's report of sale was pending and undisposed in the court files. Thus, even though it be conceded for the sake of argument that they received the necessary knowledge on June 10, 1941, when the alleged order approving the false Master's report of sale was entered, a period of less than ninety days intervened between the acquisition of such knowledge and the institution of legal proceedings on their behalf. In order for laches to intervene, it is necessary that the delay be for a period of time unreasonable under the circumstances. Respondents cite *Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 23 L. Ed. 328, and *Hayward* v. *The Eliot National Bank,* 96 U. S. 611, 24 L. Ed. 855, as to the necessity for prompt assertion of rights or claims with reference to property which is of a speculative character. In each of these cases, however, the complaining party had contemporaneous knowledge of the facts and delayed his action nearly four years in *Twin-Lick Oil Co.* v. *Marbury* and nearly three and one-half years in *Hayward* v. *The Eliot National Bank.*

## Conclusion.

It is regrettable that the contents of the brief of respondents necessitated discussion with respect to facts and issues of law which are not of substantial importance in this case, but in view of the peculiarity of the facts in the case it was not deemed advisable to allow these assertions with respect to the facts and contentions of law to go unchallenged.

It is respectfully submitted that upon the record in this case ample grounds for the granting of the petition for writ of certiorari have been established and that upon hearing

of this cause the judgment of the Supreme Court of Illinois and of the Circuit Court of Jefferson County should be reversed.

Respectfully submitted,

EDWARD R. ADAMS,
JOSEPH C. LAMY,
HUGH V. MURRAY, JR.,
*Attorneys for Petitioners*